

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SHENZHEN KANGVAPE TECHNOLOGY CO., LTD.,
Petitioner,

v.

RAI STRATEGIC HOLDINGS, INC.,
Patent Owner.

IPR2024-01406
Patent 11,925,202 B2

AUTHORIZED RESPONSE TO DIRECTOR REVIEW REQUEST

Petitioner opposes the Director Review Request of Patent Owner RAI Strategic Holdings, Inc. (“RAI”) because it is premised upon a belated new argument never raised prior to institution. Never once did the POPR mention “*Fintiv*” or any “discretionary denial” argument at all. *See* Paper 6. Nor did RAI request briefing to raise any argument after the February 28, 2025 Notice (rescinding previous *Fintiv* guidance). Despite having ample notice, RAI forfeited all its opportunities to raise any *Fintiv* argument, seeking instead a denial of institution on the merits. Now, only after RAI received the institution decision and disliked the result, RAI requests a redo of its pre-institution strategy. It is not an “abuse of discretion” for the Board to forego theoretical arguments RAI never expressed. The Board is comprised of astute judges, not telepaths burdened to mindread which new argument RAI withheld from its written briefing. Review should be denied for the following three reasons.

I. RAI DEMANDS THAT THE DIRECTOR SHOULD VIOLATE THE USPTO GUIDANCE FOR THE DIRECTOR REVIEW PROCESS

The Director Review process is not the proper vehicle to raise a new argument for the first time. Indeed, the Director’s guidance provides a straightforward explanation of what arguments should *not* be considered here:

The Director will not consider new evidence or *new arguments not part of the official record*.

See Director Review Process, §3.E, at <https://www.uspto.gov/patents/ptab/decisions/director-review-process> (emphasis added). But that is exactly what RAI is

requesting here—*de novo* consideration of a new *Fintiv* argument never formally raised in any of RAI’s written briefing to the Board.

There is no dispute on this dispositive fact. *See* RAI’s Request, 4 (admitting the “POPR did not argue for discretionary denial”). Instead, RAI improperly pinned its self-induced forfeiture on the Board. *Id.*, 8 (alleging the Board “fail[ed] to apply” factors never once argued by RAI). Not only did RAI forfeit its opportunity to raise any *Fintiv* argument in its POPR, but RAI elected to never request additional briefing after the USPTO’s February 28, 2025 Notice (rescinding previous *Fintiv* guidance). Despite having nearly a month to request additional briefing prior to the institution decision, RAI merely emailed a terse note requesting nothing. *See* RAI’s Request, 4. Yet again, RAI improperly pinned this shortcoming on the Board. *Id.*, 4 (contending “[t]he Board did not request further briefing” even though it was RAI’s option to do so). RAI waited until *after institution* to raise for the first time its *pre-institution* discretionary denial argument. This is too far. The Director should not violate her own guidance to entertain RAI’s belated new argument. *See* Director Review Process, §3.E (“will not consider”). RAI’s request should be denied.

II. THERE IS NO “ABUSE OF DISCRETION” WHERE THE BOARD FULLY ADDRESSED EVERY ARGUMENT RAISED BY RAI

RAI’s request is premised on the “abuse of discretion” standard, but a Board decision that fully addresses all written arguments from a patent owner is not an abuse of discretion. *See* RAI’s Request, 8. Indeed, the Board’s fulsome analysis is

the opposite of any “abuse of discretion,” especially where RAI intentionally withheld its *Fintiv* argument until after the Board’s decision. *See Odyssey Logistics & Tech. Corp. v. Stewart*, 130 F.4th 973, 979-80 (Fed. Cir. March 6, 2025) (“no abuse of discretion by the PTO in denying such a request” where the argument was not “timely presented and preserved”). To be clear, RAI’s request does not actually point to any part of the institution decision giving rise to an “abuse of discretion,” and instead RAI’s request essentially transitions to seek *de novo* review of a new argument never presented to the Board. *See* RAI’s Request, 8-15.

Worse yet, RAI’s strategic decision to delay its *Fintiv* argument until now deprived Petitioner of an opportunity to present a fulsome reply with responsive evidence. For example, had RAI timely requested briefing after the USPTO’s February 28, 2025 Notice, Petitioner would have sought to file responsive exhibits showcasing several flawed assumptions underlying RAI’s *Fintiv* theories. By raising its *Fintiv* argument for the first time in its request for Director Review, RAI confined Petitioner to a limited, short reply with no opportunity to present evidence. Based on this gamesmanship, the only “abuse of discretion” here would flow from a grant of RAI’s request under circumstances that raise such due process and APA concerns.

The statute dictates that IPR may not be instituted “unless” a specific determination is made. 35 U.S.C. § 314(a). Namely, the Board must look to “the information presented in the petition” and “any response filed under section 313” to

determine whether “there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims.” *Id.* That is exactly what the Board did. The statutory mandate was undoubtedly fulfilled. The Board properly addressed every argument posited in writing by RAI. That is not an “abuse of discretion.”

III. RAI’S NEW FINTIV ARGUMENT INACCURATELY REPRESENTS THE STATUS OF THE ITC CASE AND NON-OVERLAPPING DIFFERENCES

Even if the Director decides to discard the USPTO’s guidance of what will be considered here (*supra*, Section I) and to apply a *de novo* review rather than the “abuse of discretion” standard (*supra*, Section II), RAI’s analysis of the *Fintiv* factors is incomplete and lacks evidence. Importantly, the ITC’s Final Determination will never address the Morgan and Gupta grounds (Grounds 1A-B and 2A-B). The ITC Respondents already notified Judge Bhattacharyya of this formal narrowing of the ITC case. Further still, the ITC’s Final Determination will never address any of challenged claims 3, 8, 10, and 13 at all. Thus, the USPTO is the only agency that will address a vast majority of the grounds/issues listed in the institution decision. This divergence is substantive and meaningful. RAI’s request ignores all of it.

As noted above, the confines of the Director Review process do not permit Petitioner to adequately respond to all of RAI’s new *Fintiv* argument here, but some overlooked facts are noted below. Regarding **Factor 1**, no party has moved for a stay and instead, since institution, most of the invalidity issues were withdrawn from

consideration in the ITC case. Thus, a holistic approach results in this factor deserving little or no weight. For **Factor 2**, RAI noted the ITC Final Determination is set for November 2025 but then failed to note RAI's March 31, 2025 motion for leave to file supplemental briefing, which can delay the ITC's original schedule if granted. The ITC's original schedule is not a fixed point from which the Director should discard an already-instituted IPR proceeding. Regarding **Factors 3 and 4**, the Morgan and Gupta grounds will never be addressed in the ITC's Final Determination, and to the extent the PTAB or the ITC reaches the Takeuchi ground, only the PTAB will compare Takeuchi to challenged claims 3, 8, 10, and 13. Thus, the "investment" for those grounds/issues is isolated at the PTAB, and the "overlap" between the two proceedings is limited to only a subset of claims under Ground 3 alone. For **Factor 6**, critically, the Board *already* held the Petition was meritorious to satisfy the threshold for institution under §314(a) ("reasonable likelihood"). The plain text of §314(a) is fulfilled, and due process in a full PTAB trial is warranted. Depriving Petitioner now would be unjust and contrary to the text of §318(a).

The Supreme Court articulated both the Office's "basic" purpose of IPR and the public's "paramount interest in seeing that patent monopolies ... are kept within their legitimate scope." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 279-80 (2016). RAI demands that both should be prematurely sacrificed at the alter of a belated *Fintiv* argument raised only after institution. RAI's request should be denied.

Respectfully submitted,

Dated April 10, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§ 42.6(e)(4)(i) *et seq.* and 42.105(b), the undersigned certifies that on April 10, 2025, a complete and entire copy of this Authorized Response to Director Review Request was provided, to the Patent Owner via electronic mail on Patent Owner's lead and backup counsel listed below at the following email address:

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